

No. 10204

United States

19
Circuit Court of Appeals

For the Ninth Circuit.

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States
Board of Tax Appeals

FILED

AUG 20 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

JOHN L. WHEELER, Esq.,

For Comm'r.:

FRANK T. HORNER, Esq.,

Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

Mar. 11—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 11—Copy of petition served on General Counsel.

Apr. 2—Answer filed by General Counsel.

Apr. 2—Request for hearing in Los Angeles filed by General Counsel.

Apr. 4—Notice issued placing proceeding on Los Angeles, Calif. calendar. Service of answer and request made.

1941

Apr. 14—Notice of appearance of John L. Wheeler as counsel for taxpayer filed.

Sept. 6—Request for hearing in Los Angeles Sept. 22, 1941 filed by taxpayer.

Sept. 6—Request granted.

Sept. 6—Hearing set 9/22/41 at Los Angeles, Calif.

Oct. 1—Hearing had before Mr. Disney on the merits. Submitted. Stipulation of facts filed. Briefs due 11/15/41 — replies 11/30/41.

Oct. 15—Transcript of hearing of 11/1/41 filed.

Nov. 7—Brief filed by General Counsel.

Nov. 17—Brief filed by taxpayer. 11/17/41 copy served.

Dec. 5—Order extending time to Dec. 4, 1941 to file reply brief entered.

Dec. 4—Reply brief filed by taxpayer. 12/8/41 copy served.

Dec. 9—Supplemental stipulation of facts filed.

1942

Jan. 27—Findings of fact and opinion rendered, Disney. Decision will be entered for the respondent. 1/28/42 copy served.

Jan. 28—Decision entered, Disney, Div. 4.

Apr. 23—Petition for review by U. S. Circuit Court

1942

of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Apr. 23—Proof of service of petition for review filed.

May 6—Praecipe for record filed by taxpayer with affidavit of service by mail attached.

Jul. 10—Order extending time to July 31, 1942 for transmission and delivery of record entered. [1*]

United States Board of Tax Appeals .

Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby appeals from the determination of the respondent set forth in his deficiency letter dated February 8th, 1941, symbols LA:IT:90D:PB, and as a basis of this proceeding alleges as follows:

I.

Petitioner is a citizen of the United States of

*Page numbering appearing at top of page of original certified Transcript of Record.

America and now resides at 2047 San Pasqual Avenue, Pasadena, California.

II.

The deficiency letter, copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioner on or about February 8th, 1941.

III.

The taxes in controversy are for the calendar year 1938, and amount to the sum of \$1,436.37.

IV.

The determination of taxes set forth in said deficiency letter is based upon the following error:

1. Commissions received from the Prudential Insurance Company in the amount of \$21,504.80, which formed a part of the compensation received by petitioner as manager of Ordinary Agency "A" of the Prudential [2] Insurance Company in Los Angeles, California, was held to be the separate property of the petitioner. This ruling was erroneous as this income was community income and property under Section 161 A of the Civil Code of California, and as such belonged to petitioner and his wife, Lura D. Fooshe, in equal portions. Thus, the sum of \$10,752.40 was the income of the petitioner and properly reported on his return. Likewise, the same amount was income of Lura D. Fooshe and was properly reported on her return.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

1. On May 1st, 1938, petitioner became manager of Ordinary Agency "A" of the Prudential Insurance Company in Los Angeles, California. Prior to that time petitioner had been manager of the Ordinary Agency in St. Louis, Missouri. While acting as manager of the St. Louis Agency, petitioner's duties and compensation were determined by a standard form manager's contract, designated as an "old terms contract", entered into between the Prudential Insurance Company and petitioner.

Upon becoming manager of the Los Angeles Ordinary Agency "A", the contract which had been in effect as to the St. Louis Ordinary Agency was cancelled and a new agreement was made. Under the provisions of this new agreement, the total compensation to be received by petitioner as manager of the Los Angeles Ordinary Agency "A" was based in part upon a standard form contract designated as a "new terms contract" [3] and in part by an agreement under which the Prudential Insurance Company waived its collection fee of 2% on certain business in force in St. Louis and paid the sums realized by reason of this waiver to petitioner as a part of his compensation as manager of the Los Angeles Agency.

This method of determining the total com-

pensation to be received by petitioner as manager of the Los Angeles Ordinary Agency "A" was employed because of:

(a) The long experience and ability of the petitioner in building and managing such Ordinary offices:

(b) The amount of insurance written and in force was much greater in the St. Louis Ordinary Agency than in the Los Angeles Ordinary Agency "A"; and

(c) The changes made in the basis of determining the compensation of the manager of an Ordinary Agency under the contract in force when petitioner was manager of the St. Louis Ordinary Agency and that which the company employed when petitioner became manager of the Los Angeles Ordinary Agency "A".

The particular form of agreement was employed because it was the most flexible and satisfactory from the standpoint of the two contracting parties.

Under this agreement between the Prudential Insurance Company and the petitioner as manager of the Los Angeles Ordinary Agency "A", petitioner received \$21,504.80 in 1938 by reason of the waiver by the [4] by the Prudential Insurance Company of its collection fee on certain business in force in the St. Louis Ordinary Agency. This amount being received as compensation for services performed as man-

ager of the Los Angeles Ordinary Agency "A", was community property within the purview of Section 161 A of the Civil Code of California, and as such, one-half of this amount was reported by petitioner on his return for the year 1938 and one-half thereof was reported on the return of petitioner's wife, Lara D. Fooshe.

Wherefore, petitioner prays that the Board hear this petition and order a refund of \$1,436.37, or such other sum as is meet and proper in the premises.

JOHN L. WHEELER

Counsel for Petitioner

(Duly verified.) [5]

EXHIBIT "A"

TREASURY DEPARTMENT

Internal Revenue Service

Twelfth Floor

U. S. Post Office and Court House

Los Angeles, California

Feb. 8, 1941

Los Angeles Division

LA:IT:90D:PB

Mr. Claude R. Fooshe

4166 Woodleigh Lane

Pasadena, California

Sir:

You are advised that the determination of your income tax liability for the taxable year ended De-

ember 31, 1938 discloses a deficiency of \$1,436.47, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner

by

(Sgd) GEORGE D. MARTIN

Internal Revenue Agent in
Charge

Enclosures:

Statement.

Form of Waiver [6]

LA:IT:90B:PB

Mr. Claude R. Fooshe,
4166 Woodleigh Lane
Pasadena, California

TAX LIABILITY FOR THE TAXABLE YEAR ENDED
DECEMBER 31, 1938

| | Liability | Assessed | Deficiency |
|------------------|------------|-----------|------------|
| Income Tax | \$2,199.34 | \$ 762.87 | \$1,436.47 |

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 9, 1940; to your protest dated March 6, 1940; and to the statements made at the conferences held on March 22, May 17 and August 8, 1940.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiency.

A copy of this letter and statement has been mailed to your representative, Mr. John L. Wheeler, 1240 Pacific Mutual Building, 523 West Sixth Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

| | | |
|--|-------------|-------------|
| Net income as disclosed by return..... | | \$10,970.48 |
| Additional income and unallowable de- | | |
| ductions: | \$10,752.40 | |
| (a) Commissions received | | |
| (b) Depreciation disallowed | 47.22 | |
| (c) Net Long-term capital loss dis- | | |
| allowed | 1,780.10 | 12,579.72 |
| | <hr/> | <hr/> |
| Net income adjusted | | \$23,550.20 |
| | | [7] |

Mr. Claude R. Fooshe

Statement

Explanation of Adjustments

(a) Terminal commissions in the amount of \$21,504.80, received from Prudential Life Insurance Company on insurance written while you were Agency Manager at St. Louis, Missouri, are held to be your separate property. This income did not constitute community property within the purview of section 161(a) of the Civil Code of California. Since you included in your return only \$10,752.40 of this amount, your income is increased \$10,752.40.

(b) The amount of depreciation allowable under the provisions of section 23(1) of the Revenue Act of 1938 on Essex Avenue property is \$150.00. Since you claimed \$197.22 as depreciation on this property, the amount of \$47.22 is disallowed.

(c) The loss of \$1,000.00 claimed in your return on account of worthlessness of \$2,000.00 convertible debenture "A" 6's of 1933 of East Coast Utilities Company is disallowed because the bonds were not ascertained to be worthless within the taxable year, within the meaning of section 23 (k) of the Revenue Act of 1938.

The following losses claimed on account of securities becoming worthless are disallowed because the securities did not become worthless during the taxable year, hence the losses claimed were not sustained during the taxable year and are not deductible.

| Security | Loss Claimed |
|--|--------------|
| Stock of Franklin American Trust Company (St. Louis, Missouri) | \$ 300.00 |
| Stock of Penco Realty Company | 120.00 |
| | <hr/> |
| Total..... | \$ 420.00 |

In lieu of the losses totaling \$467.20, claimed with respect to the sale of 10 shares of 6 per cent preferred stock, and 42 shares of common stock of American Utility Service Corporation, the following loss is determined, resulting in the disallowance of \$233.10;

| | |
|---|-----------|
| Sale price of above stocks, total..... | \$ 31.80 |
| Cost (bond purchased in 1923, exchanged for above stocks) | 500.00 |
| | <hr/> |
| Loss sustained | \$ 468.20 |
| Deductible loss, 50% (section 117, Revenue Act of 1938) | \$ 234.10 |

[8]

Mr. Claude R. Fooshe

Statement

The realized profit of \$298.00 from the sale of two horses is not subject to the limitation provided in section 117 of the Revenue Act of 1938, because the horses were not capital assets as defined in that section. The gain of \$149.00, included in your return, is, therefore, increased \$149.00.

Due to mathematical errors, the net long-term

capital loss is understated in your return \$22.00.

The above adjustments result in a net decrease in net long-term capital loss of \$1,780.10.

COMPUTATION OF TAX

| | | | |
|--|----|-----------|-------------|
| Net income adjusted | | | \$23,550.20 |
| Less: | | | |
| Personal exemption | | 2,500.00 | |
| | | | <hr/> |
| Balance (surtax net income)..... | | 21,050.20 | |
| Less: | | | |
| Earned income credit (10% of \$14,000.00)..... | | 1,400.00 | |
| | | | <hr/> |
| Net income subject to normal tax..... | | 19,650.20 | |
| Normal tax at 4% on \$19,650.20 | \$ | 786.01 | |
| | | 21,050.20 | 1,417.53 |
| | | | <hr/> |
| Total tax | | 2,203.54 | |
| Less: Income tax paid at the source..... | | 4.20 | |
| | | | <hr/> |
| Correct income tax liability..... | | 2,199.34 | |
| Income tax assessed: | | | |
| Original, account No. 205520..... | | 762.87 | |
| | | | <hr/> |
| Deficiency of income tax..... | | 1,436.47 | |

[Endorsed]: U.S.B.T.A. Filed Mar. 11, 1941. [9]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows: [10]

I. and II.

Admits the allegations contained in paragraphs I. and II. of the petition.

III.

Denies so much of paragraph III. of the petition as alleges that the amount in controversy is \$1,436.37; admits all other allegations therein contained.

IV.

Denies the allegations of error contained in paragraph IV. of the petition. [10]

V.

Admits so much of paragraph V. of the petition as alleges that on May 1, 1938, the petitioner became manager of Ordinary Agency "A" of the Prudential Insurance Company in Los Angeles, California; that prior to that time the petitioner had been manager of the Ordinary Agency in St. Louis, Missouri; that while acting as manager of the St. Louis Agency the petitioner's duties and compensation were determined by a contract entered into between the Prudential Insurance Company and the petitioner, and denies all other allegations therein contained.

VI.

Denies each and every allegation contained in the

petition not hereinbefore specifically admitted or denied.

Wherefore it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL

FTH

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

Division Counsel.

FRANK T. HORNER,

Special Attorney,

Bureau of Internal Revenue.

FTH/fmt 3/28/41

[Endorsed]: U.S.B.T.A. Filed Apr. 2, 1941. [11]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties to the above-entitled case, through their respective counsel, as follows:

1. The petitioner is at present, and has been since about the first of May, 1938, manager of an ordinary agency, at Los Angeles, California, of the Prudential Insurance Company of Newark, New Jersey, under certain agreements in this stipulation mentioned, entered into by and between the said Pru-

dential Insurance Company and the petitioner. Under date of April 25, 1938, a contract was entered into by and between the petitioner and the said company, effective on or about May 1, 1938. A copy of this contract is attached as Exhibit A, and may be received in evidence.

2. On or about August 4, 1919, the Prudential Insurance Company and the petitioner entered into a contract with respect to his services as manager of an ordinary agency at St. Louis, Missouri. A copy of this contract is attached as Exhibit B, and may be received in evidence. [12]

3. On or about May 17, 1927, the contract of August 4, 1919 (Exhibit B, paragraph 2 hereof), was amended. A copy of this amendment is attached hereto as Exhibit C, and may be received in evidence.

4. In order to provide some inducement to the petitioner to relinquish his position in St. Louis, Missouri, and assume the management of an ordinary agency in Los Angeles, California, it was agreed that the petitioner would be paid the full terminal commissions on renewal premiums under the contract of 1919 (Exhibit B, paragraph 2 hereof) without deduction by the said insurance company of the collection fee of two percent. No formal written agreement, in the form of a contract, was executed by the parties. However, the agreement just referred to was expressed in a letter written by the petitioner at St. Louis, Missouri, under date of February 23, 1938, and addressed to the Pru-

dential Insurance Company, a copy of which is attached hereto as Exhibit D, and may be received in evidence.

5. In a letter dated February 24, 1938, the Prudential Insurance Company replied to the petitioner's letter (Exhibit D, above), confirming the understanding of the petitioner as expressed in the above-mentioned letter (Exhibit D). A copy of the said reply is attached hereto as Exhibit E, and may be received in evidence.

6. On March 14, 1938, the Prudential Insurance Company addressed the petitioner, a copy of which communication is attached hereto as Exhibit F, and may be received in evidence. [13]

7. Pursuant to the agreements and contracts referred to in this stipulation, the petitioner came to California from St. Louis, Missouri, on or about May 1, 1938, to perform the services in Los Angeles, California, provided for under the said agreements and contracts.

8. Prior to May 1, 1938, the petitioner was the St. Louis, Missouri, manager of an ordinary agency of the Prudential Insurance Company of Newark, New Jersey, under a contract executed in 1919 and amended in 1927 (Exhibits B and C).

9. Between the time of the petitioner's arrival in Los Angeles, California, on or about May 1, 1938, to assume his new duties, and the end of the taxable year 1938, which year is involved in this proceeding,

the petitioner received from the Prudential Insurance Company of Newark, New Jersey, the sum of \$21,504.80, all of which has been included by the respondent in the taxable income of the petitioner for 1938. This sum of money represented the equivalent of two and one-half per cent of the premiums collected in the said St. Louis ordinary agency after April 30, 1938, and paid by policyholders on policies issued while the petitioner was manager of the ordinary agency of the said insurance company at St. Louis, Missouri, under the contracts herein mentioned (Exhibits B and C).

10. At the close of business December 31, 1937, there was in force in the ordinary agency at St. Louis, Missouri, in the territory [14] of which the petitioner had charge, \$49,122,406.00 of life insurance issued by the Prudential Insurance Company, of which amount the sum of \$5,153,004.00 represented new life insurance written under the supervision of this petitioner during the year 1937.

11. At the close of business December 31, 1937, the territory in Los Angeles, California, to which the Prudential Insurance Company later transferred the petitioner as a manager of an ordinary agency, had in force life insurance issued by the Prudential Insurance Company in the amount of \$29,077,437.00, of which amount \$846,237.00 represented new life insurance issued in said Los Angeles territory during the year 1937.

12. In 1938, the standard form of ordinary man-

ager's contracts used by the Prudential Insurance Company was different from that in use in 1919. Acceptance by the petitioner in this case of the Los Angeles managership of an ordinary agency, solely on the basis of the said standard new form of contract in use in 1938, and without any change in the 1919 contract (Exhibits B and C), would have resulted in a substantial decrease in the petitioner's compensation immediately after his arrival in Los Angeles, California, because of the fact that less life insurance was in effect in said Los Angeles agency than had been in effect in St. Louis, and, also, on the basis of the new life insurance issued in 1937 in said Los Angeles agency, [15] the said new insurance to be issued in the following year (1938) would probably have been less than had been written during the last year (1937) of Mr. Fooshe's managership in St. Louis, Missouri.

13. In response to a request of the petitioner for information as to the reason for the termination, by the Prudential Insurance Company, of his St. Louis, Missouri, contract of 1919 (Exhibit B), the Prudential Insurance Company advised Mr. Fooshe, the petitioner, under date of April 17, 1940, a copy of which communication is attached hereto as Exhibit G, and may be received in evidence.

14. If the Prudential Insurance Company had not waived its right to deduct the collection fee of two per cent from the terminal commissions payable to the petitioner under the St. Louis ordinary man-

agership contract of 1919, after Mr. Fooshe assumed the new position in Los Angeles, California, the petitioner would still have been entitled to the net amount representing one-half per cent of the renewal premiums collected by the said St. Louis office, of which the petitioner was manager until about the first of May, 1938.

15. The contract between the Prudential Insurance Company and the petitioner, which was executed on August 4, 1919 (Exhibit B, paragraph 2 hereof), provided for the payment by the Prudential Insurance Company to its manager the commissions specified therein of the renewal premiums on insurance policies issued, of which percentage [16] the manager of the ordinary agency, in this case the petitioner, was entitled to receive personally and retain for his personal use only two and one-half per cent, the balance being paid to the particular agent writing the insurance. While the amount to be retained by the manager varies in certain instances, yet for the purposes of this particular case, the parties agree that the Board may accept as a fact, as a basis for its consideration and determination of the issue in this case, that the petitioner's commissions on the collection of premiums on the policies written under his supervision while manager at St. Louis, amounted to two and one-half per cent.

16. The return of the petitioner for the year 1938 was filed with the United States Collector of Internal Revenue at Los Angeles, California.

17. Attached is a copy of an affidavit of George H. Chace, executed October 25, 1940, marked Exhibit H, and may be received in evidence.

(Sgd) JOHN L. WHEELER

Counsel for Petitioner.

(Signed) J. P. WENCHEL

FTH

Chief Counsel,

Bureau of Internal Revenue.

Counsel for Respondent.

[Endorsed]: U.S.B.T.A. Filed Oct. 1, 1941. [17]

EXHIBIT A

This Contract, made this 25th day of April, 1938, by and between The Prudential Insurance Company of America, of Newark, N. J., hereinafter designated as the Company, and Claude R. Fooshe of St. Louis in the State of Missouri, hereinafter designated as the Manager,

Witnesseth: That the said Company and Manager, in consideration of the sum of one dollar each to the other in hand paid, and of the covenants and agreements hereinafter specified, hereby mutually covenant and agree, each with the other, as follows, to wit:

Section 1.—That the Company does hereby appoint the above named as Manager of the Los Angeles "A", California, Ordinary Agency covering the following territory: In Inyo, Kings, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Luis

Obispo, Santa Barbara, Tulare and Ventura counties. to obtain, supervise and instruct Agents for the Company in the territory named, to procure applications for insurance and annuities exclusive of Industrial, Monthly Debit Ordinary and Intermediate Monthly Premium Industrial insurance in the said Company and to collect and pay over the premiums and considerations thereon to the Company in cash on such insurance and annuities when effected, and to perform such other duties in connection therewith as may be required by the Company.

Section 2.—That the Manager shall devote his entire time and energies to the business of the Company, promote its success and welfare, and be governed by the written and printed instructions and rules which he may from time to time receive from the Company.

Section 3.—That the Manager shall keep correct accounts in the books provided by the Company of all business done and moneys collected; that all books, accounts, documents, vouchers and other papers connected with the business of the Company are and shall be its property and at any time open to inspection and examination by its authorized representative; and that the Manager shall render when required, on the forms provided by the Company, a true account of all moneys received by him on behalf of the Company.

Section 4.—That all moneys received or collected by the Manager for or on behalf of the Company, after making such deductions as are authorized by

the Company, shall be held by the Manager in trust for the Company, and shall not be used by him for any purpose whatsoever, except as specially authorized by the Company, but shall be immediately deposited to the credit of The Prudential Insurance Company of America in a bank designated by the Company, or shall be paid over to such person as the Company may designate.

Section 5.—That the Manager shall not incur or authorize the incurring of any expense on account of the Company, without written authority.

Section 6.—That the Manager shall not issue or distribute or authorize the issuance or distribution of any circulars or papers, or write or send any communication to or insert any advertisement in any publication in any way relating to this or any other life insurance company or society without written authority from the Company; or use or authorize the use of language, orally or in writing, or commit or authorize the committing of any act tending to bring this or any other company or society into disrepute.

Section 7.—That the Manager shall have no authority on behalf of the Company to make, alter or discharge any policy or Annuity contract, to extend the time for paying a premium or a consideration, to waive forfeitures, to incur any liability on behalf of the Company or to allow the delivery of any policy unless the applicant be in good health and the first premium paid in full or to allow the delivery of any Annuity contract unless the initial premium or consideration is paid in full.

Section 8.—That the Manager shall have no authority on behalf of the Company to enter into any contract or agreement with Agents or Brokers and all contracts and agreements with Agents or Brokers shall be valid only when signed by the President, one of the Vice Presidents, the Secretary or an Assistant Secretary of the Company.

Section 9.—That the Company shall have the right to make changes in its method of conducting business, to divide the territory set forth in Section 1 hereof and to make other appointments in such territory, as from time to time may seem to the Company to be desirable.

Section 10.—That in consideration of the services herein described being performed and this contract being fulfilled by the Manager upon the terms and conditions herein stated, he shall receive a guaranty salary at the rate of \$600.00 per month.

Section 11.—That in addition the Manager shall receive:

(a) As an over-riding commission a sum equal to five per cent. (5%) of all first-year commissions paid by the Company to Agents or Brokers in accordance with their individual contracts with the Company on business written while operating through his Agency, and of the first-year commissions paid to the Manager in accordance with Section 13 hereof, except that in the event of the transfer to or from the Agency of any policy or contract the Company shall have the right to adjust the said

over-riding commission, or pay no over-riding commission on the business so transferred, as the Company may decide; and,

(b) As an over-riding commission in addition to the compensation specified in Section 11 (a) hereof, a sum equal to fifteen per cent. (15%) of the first-year commissions paid by the Company to Agents or Brokers in accordance with their individual contracts with the Company on considerations paid on account of Group Annuity contracts written by such Agents or Brokers while operating through his Agency, except that in the event of the transfer to or from the Agency of any such Group Annuity contracts the Company shall have the right to adjust the said over-riding commission, or pay no over-riding commission on the Group Annuity contracts so transferred, as the Company may decide; and,

(c) As an over-riding commission in addition to the compensation specified in Section 11 (a) hereof, a sum equal to one-half of one per cent. ($\frac{1}{2}$ of 1%) of the purchase price of Single-Payment Annuities written by the Manager personally or by Agents or Brokers while operating through his Agency.

Section 12.—That the Manager, until further notice, shall receive an additional compensation, payable monthly, which shall be determined as follows: The Manager shall be credited with the amount of life insurance (excluding all Group and Wholesale policies) and *Retirement Annuities issued and paid for or revived to the credit of said Agency; from

this credit shall be deducted the amount of life insurance (other than Group and Wholesale policies) and *Retirement Annuities in force in said Agency which become lapsed or canceled because of the discontinuance for any reason of premium payments to the Company before completion of the premium-paying period provided in the policies or contracts, including all policies and contracts surrendered for cash or which are effective only under their non-forfeiture provisions and policies and contracts transferred from the said Agency which become lapsed or canceled for any reason before the payment of the full first-year premiums has been completed, excluding from the computations of the amounts charged to the Manager, cancelations upon death, disability claims, matured endowments, policies and contracts becoming fully paid up by premium payments or by dividend accumulations and Term policies expired; upon the remainder the Manager shall receive one dollar (\$1.00) for each one thousand dollars (\$1000) of such amount, but if the charges exceed the credits, the difference shall be charged to the Manager and the Manager shall be required to offset such net charges before receiving any further compensation under this Section.

*The amount to be credited or deducted on account of Retirement Annuity contracts in computing the compensation to be paid in accordance with the above Section shall be an amount as determined by the Company for each \$100.00 Annual Premium Unit, based upon the number of Annual Premiums called for in the Retirement Annuity contract. [18]

Section 13.—That, with respect to the business procured by the Manager personally, he shall receive, during the continuance of this contract, commissions on premiums and considerations collected by him on such business and paid to the Company in cash, at the rates and for the periods set forth in the following tables (except in the cases of policies issued as a result of the conversion of Group Life insurance certificates or Wholesale policies in connection with which cases no commissions will be paid, and except in the particular instances involving certain monthly premiums as hereinafter set forth); and provided that commissions on premiums or considerations discounted and paid in advance shall be allowed the Manager only on the due dates of such premiums or considerations.

| Kind of Policy | Per Cent. of Premiums | |
|--------------------------------|-----------------------|---------------------------------------|
| | First Policy Year | Second to Tenth Policy Year Inclusive |
| Modified Life 3 | 50 | 5 |
| Modified 3-20 | 50 | 5 |
| 30-Payment Life | 50 | 5 |
| 25-Payment Life | 45 | 5 |
| 20-Payment Life | 45 | 5 |
| 15-Payment Life | 40 | 5 |
| 10-Payment Life | 35 | 5 |
| 5-Payment Life | 20 | 5 |
| 33-Year or Longer, Endowment.. | 50 | 5 |
| 28-Year to 32-Year Endowment.. | 45 | 5 |
| 23-Year to 27-Year Endowment.. | 40 | 5 |
| 20-Year to 22-Year Endowment.. | 35 | 5 |
| 18-Year to 19-Year Endowment.. | 35 | 3 |
| 13-Year to 17-Year Endowment.. | 25 | 3 |
| 8-Year to 12-Year Endowment.. | 20 | 3 |
| 5-Year to 7-Year Endowment.... | 10 | 3 |

| Kind of Policy | Per Cent. of Premiums | |
|-------------------------------------|-----------------------|---------------------------------------|
| | First Policy Year | Second to Tenth Policy Year Inclusive |
| 20-Payment 30-Year Endowment | 40 | 5 |
| 15-Payment 30-Year Endowment | 40 | 3 |
| 15-Payment 25-Year Endowment | 35 | 3 |
| 15-Payment 20-Year Endowment | 30 | 3 |
| 10-Payment 25-Year Endowment | 30 | 3 |
| 10-Payment 20-Year Endowment | 30 | 3 |
| 10-Payment 15-Year Endowment | 25 | 3 |
| 20-Payment Life with Pure Endowment | | |
| Addition at end of 20 years | 45 | 5 |
| Preliminary Term | 7½ | None |
| Extra Premiums | 5 | 5 |

Renewal commissions on any policy shall not extend beyond the premium-paying period.

Single-Premium Insurance

The commissions payable on Single-Premium Insurance policies shall be one per cent. (1%) of the premiums of such Single-Premium Insurance policies, plus one per cent. (1%) of the amounts of insurance.

Salary-Allotment Insurance

Commissions shall be at the same rates as for individual policies as set forth in these tables.

Modified Life Policy

With Change of Rate at End of Five Years

First policy year, 40% of premium.

Second to fifth policy year, inclusive, 5% of premiums.

Sixth policy year, 5% of the premium payable under the policy as in the first to fifth policy year, inclusive.

Sixth policy year, 40% on the excess of the premium in the said year over what the premium was in each of the five policy years preceding.

Seventh to tenth policy year, inclusive, 5% of premiums.

| KIND OF POLICY | Per Cent. of Premiums | |
|---|-----------------------|-----------------------------------|
| | First Policy Year | Second to Tenth Policy Year Incl. |
| One-Year Renewable Term Group Insurance * † ‡ | | |
| First \$1,000 of premiums or part thereof | 20 | 5 |
| Next 4,000 of premiums or part thereof | 20 | 3 |
| Next 5,000 of premiums or part thereof | 15 | 11½ |
| Next 10,000 of premiums or part thereof | 12½ | 11½ |
| Next 10,000 of premiums or part thereof | 10 | 1½ |
| Next 20,000 of premiums or part thereof | 5 | 11½ |
| Excess of premiums over \$50,000..... | 2½ | 1 |

*The premiums for the first policy year are the premiums which fall due within twelve months from the date of issue of the policy. The premiums for the second and subsequent policy years are those premiums which fall due in the second and subsequent periods of twelve months, respectively, from the date of issue of the policy.

†Includes Group Life, Accident and Sickness, or Accidental Death and Dismemberment Insurance issued to an employer and insurance on the One-Year Renewable Term plan issued to members of a group of one hundred or more persons who are borrowers from one bank under unsecured personal loans.

No commission shall be payable on account of any such policy issued upon the lives of members of any Association or Labor Union who are not actual employees of such Association or Labor Union.

‡The commission rates for One-Year Renewable Term Group Insurance shall apply only to such insurance as may be secured solely through the personal efforts of the Manager; except that in the case of increases or additions due to a change in the plan of insurance, or the inclusion of new classes or units by amendment, the Company shall have the right to determine what, if any, commissions shall be allowed the Manager.

WHOLESALE INSURANCE

PER CENT. OF PREMIUMS*

*The premiums for the first policy year will include only those premiums paid which fall due within twelve months from the date of the first policy issued to a member of a group insured under the Wholesale plan.

| First Policy Year | Second to Tenth Policy Year Incl. |
|-------------------|-----------------------------------|
| 35 | 5 |

The premiums for the second and subsequent years are those premiums paid which fall due in the second and subsequent periods of twelve months, respectively, from the date of the aforesaid first policy.

| GROUP ANNUITIES | Per Cent of Net Considerations* | |
|--|---------------------------------|-------------------------------------|
| | First Contract Year | Second to Tenth Contract Year Incl. |
| First \$20,000 of net considerations or part thereof | 7.0 | 1.0 |
| Next \$30,000 of net considerations or part thereof | 3.0 | 1.0 |
| Next \$450,000 of net considerations or part thereof | 1.0 | 0.4 |
| Excess of net considerations over \$500,000..... | 0.4 | 0.2 |

*The net considerations for any contract year are the total considerations due in such contract year and paid to the Company, less all refunds by the Company, either in cash or as a credit becoming due in such contract year on account of the withdrawal of employees from service.

The term "First Contract Year" refers to the twelve consecutive months starting with the effective date of the Group Annuity contract, and the term "Contract Year" as used in the expression "2d to 10th Contract Year, inclusive" refers to the nine periods of twelve consecutive months starting with the 1st to 9th anniversaries, respectively, of the effective date of the Group Annuity contract.

Retirement Annuity

First year commissions will be based on the length of the period during which premiums are payable as follows:

- 20 years or longer.....25% of the premium.
- 15 to 19 years.....20% of the premium.
- 10 to 14 years.....15% of the premium.

Renewal commissions will be allowed at the same rates as for Endowment policies with premium payments covering the same period.

Annuity (Single-Payment)

Commission shall be two per cent. (2%) of the purchase price.

| 10-Year or 15-Year Term | Per Cent. of Premiums | |
|------------------------------------|-----------------------|-----------------------------------|
| | First Policy Year | Second to Tenth Policy Year Incl. |
| \$1,000 and less than \$2,000..... | 10 | 5 |
| 2,000 and less than 3,000..... | 15 | 5 |
| 3,000 and less than 4,000..... | 20 | 5 |
| 4,000 and less than 5,000..... | 25 | 5 |
| 5,000 and upwards..... | 30 | 5 |

If, however, any of the policies or Annuity contracts specified above are issued with premiums payable on a monthly basis (excluding all Group Insurance, Group Annuities, Wholesale Insurance and Salary Allotment Insurance policies), no commissions shall be payable on the first monthly premium, but commissions shall be payable on monthly premiums becoming due thereafter, as follows:

- (a) On premiums falling due in the second to the eleventh policy or Annuity contract month, inclusive, first commissions at the rate set forth above;
- (b) On premiums falling due in the twelfth policy or Annuity contract month commissions at twice the first-year commission rate as set forth above;
- (c) On premiums falling due in the second to the tenth policy or Annuity contract year, inclusive, commissions at the rate and for the period specified as set forth above.

The commissions on premiums or considerations on all policies or Annuity contracts not named in the above tables shall be determined by the Company. [19]

Section 14.—That no commissions shall be paid to the Manager on account of any policy or Annuity contract, issued under this contract, after it has been lapsed or after the discontinuance of premium or consideration payments for any reason, by the insured, the annuitant or the holder of the policy or

Annuity contract; but, if during the continuance of this contract the Manager shall secure the revival of any policy or Annuity contract originally written by him personally, the Company will pay commissions thereon to the Manager in accordance with Section 13 hereof, as though the policy or Annuity contract had not been lapsed; but, where the Manager secures the revival of any policy or Annuity contract not written by him personally, the Company reserves the right to adjust credit and commissions in accordance with its general rule and practice.

Section 15.—That if a policy or Annuity contract issued under this contract is changed and an allowance or credit on account of such change is applied to premiums or considerations on the new policy or Annuity contract, the Company shall have the right to adjust the commissions, or to pay no commissions, as the Company may decide.

Section 16.—That if the Company shall return all the premiums or considerations or any portion thereof on a policy or Annuity contract issued under this or any previous contract, the Manager shall repay to the Company, on demand, the amount of commission received by him on premiums or considerations so returned.

Section 17.—That if a policy or Annuity contract issued under this contract replaces a policy or policies, or Annuity contract or Annuity contracts, previously issued by this or any other insurance company or society, the Company shall have the right

to adjust the commissions, or to pay no commissions, as the Company may decide.

Section 18.—That if a Modified Life Policy with Change of Rate at End of Five Years issued under this contract is changed to another kind of policy or an Annuity contract, the Manager shall not thereafter receive commissions as set forth herein for such Modified Life Policy, but the Company shall have the right to adjust the commissions in accordance with its general rule and practice.

Section 19.—That the Manager will not pay or allow, or offer to pay or allow, as an inducement to any person to insure or to purchase an Annuity contract, any rebate of premium or consideration or any inducement whatever not specified in the policy or Annuity contract.

Section 20.—That no assignment of commissions accrued or to accrue under this contract shall be valid as against the Company unless authorized in writing by the Company.

Section 21.—That the Company shall have and is hereby given a first lien upon any compensation, or claims therefor, under this or any prior contract, as security for the payment of any claims due or to become due to the Company from the Manager, and the Manager shall pay interest on any outstanding indebtedness at the rate of five per cent. (5%) per annum, the interest to be computed at the end of each contract year on the average indebtedness existing during such year.

Section 22.—That this contract may be terminated

by either party by a notice in writing delivered personally, or mailed to the other party at the last known address, at least thirty days before the date therein fixed for such termination; except that the Company may immediately terminate this contract if the Manager fails to comply with any of its conditions or obligations.

Section 23.—That if this contract be terminated the compensation to be paid to the Manager, his executors, administrators or assigns thereafter shall be:

(a) Commissions as provided in Section 13 hereof if terminated for any reason other than specified in Section 23 (b) hereof.

(b) If terminated because the Manager has violated the terms of Section 19 hereof; or if the Manager, either during the continuance or after the termination of this contract, shall default in the payment to the Company of premiums or considerations collected by him, or withhold or convert any money or property received by the Manager for or belonging to the Company or any of its policyholders, annuitants, beneficiaries or other payees, or if the Manager demands or accepts any remuneration from a policyholder, annuitant or beneficiary or their representatives for services in connection with the settlement of a claim or the securing of any right or privilege under a policy or contract issued by the Company, or if the Manager shall take any action towards inducing the Agents of the Company to leave its service or make any attempt to induce

its policyholders or annuitants to relinquish their policies or contracts, or shall exceed the limitations of authority set forth in this contract; the Manager shall forfeit all commissions which have otherwise been reserved to him by this or any previous contract.

Section 24.—That the Company shall incur no liability whatsoever by reason of furnishing information, upon inquiry therefor from any person, regarding the Manager's record with the Company, his personal character, habits, ability or cause for leaving the service of the Company.

Section 25.—That this contract shall take effect as of the second day of May, 1938, when signed by the Manager, and executed on behalf of the Company by the President, one of the Vice Presidents or the Secretary.

In Witness Whereof, the parties to this contract have executed the same, in duplicate, the day and year first above written.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

By HENRY B. SUTPHEN

Vice President.

CLAUDE R. FOOSHE

Manager.

Countersigned by:

A. E. N. GRAY

Assistant Secretary. [20]

MANAGER'S CONTRACT

Between The Prudential Insurance Company of America, Incorporated under the laws of the State of New Jersey, and Claude R. Fooshe, Manager.

Examined, W. E. Franck.

WJM [21]

Ex 10

This Contract, made this Fourth day of August

1919, by and between **The Prudential Insurance Company of America, of Newark, N. J.**

party of the first part, and

CLAUDE R. FOOBER

of ST. LOUIS in the County of ST. LOUIS and State of MISSOURI.

party of the second part.

Witnesseth: That the said parties, in consideration of the sum of one dollar each to the other in hand paid, and of the covenants and agreements hereinafter mentioned, hereby mutually covenant and agree, each with the other, as follows, to wit:

Section 1. That the said party of the first part hereinafter designated as the Company, doth hereby appoint the said party of the second part, hereinafter designated as the Manager, as Manager for the following territory MISSOURI, DISTRICT NO. 1, EXCEPTING THE CITIES OF ST. LOUIS, ST. CHARLES, SPRINGFIELD, AND WARREN, MISSOURI, AND THE CITIES OF ST. LOUIS, ST. CHARLES, SPRINGFIELD, AND WARREN, MISSOURI, AND THE CITIES OF ST. LOUIS, ST. CHARLES, SPRINGFIELD, AND WARREN, MISSOURI for the purpose of procuring applications for ordinary insurance on the said Company, with premiums payable annually, semi-annually or quarterly, and for the further purpose of collecting and paying over premiums to the Company in cash on such insurance when effected, and of performing such other duties in connection therewith as may be required by said Company, and that this contract shall be treated as strictly confidential.

Section 2. That the Manager shall devote his entire time, talents and energies to the business of the Company and appoint agents in the territory named, for whose fidelity and honesty he shall be held responsible.

Section 3. That during the continuance of this contract and only upon the condition that the Manager, as such, remains continuously in the employ of the Company the compensation to be allowed the Manager shall be a commission on premiums when collected and paid to the Company in cash on policies written by or through him under this contract, as follows:

| REGULAR POLICIES | Per Cent. of Premiums in the First Policy Year | Per Cent. of Premiums in the Second to the Tenth Policy Year, Inclusive | Per Cent. of Premiums in the Eleventh to the Fifteenth Policy Year, Inclusive |
|---|--|---|---|
| Whole Life | 50 | 7 1/2 | 5 |
| 20-Payment Life | 40 | 7 1/2 | 5 |
| 25-Payment Life | 40 | 7 1/2 | 5 |
| 30-Payment Life | 40 | 7 1/2 | 5 |
| 15-Payment Life | 30 | 7 1/2 | 5 |
| 10-Payment Life | 20 | 7 1/2 | 5 |
| 5-Payment Life | 15 | 7 1/2 | 5 |
| 20-Year Endowment | 40 | 7 1/2 | 5 |
| 25-Year Endowment | 30 | 7 1/2 | 5 |
| 30-Year Endowment | 30 | 7 1/2 | 5 |
| 15-Year Endowment | 25 | 5 | 5 |
| 10-Year Endowment | 20 | 5 | 5 |
| 5-Year Endowment | 10 | 5 | 5 |
| 20-Payment 20-Year Endowment | 35 | 7 1/2 | 5 |
| 15-Payment 20-Year Endowment | 25 | 5 | 5 |
| 10-Payment 20-Year Endowment | 20 | 5 | 5 |
| 5-Payment 20-Year Endowment | 10 | 5 | 5 |
| 10-Payment 25-Year Endowment | 25 | 5 | 5 |
| 10-Payment 30-Year Endowment | 20 | 5 | 5 |
| 10-Payment 15-Year Endowment | 20 | 5 | 5 |
| 20-Pay't Life with Pure End't Addition at End of 20 Years | 40 | 7 1/2 | 5 |
| 10-Year Term | 20 | 7 1/2 | |
| Preliminary Term (Commission not allowed until regular premium is paid) | 7 1/2 | | |
| Single-Payment | 5 | | |
| Annuity | 2 | | |
| Extra Premiums | 5 | | |
| One Year Renewable Term Group Insurance | 10 | 5 | |

| INTERMEDIATE POLICIES | Per Cent. of Premiums in the First Policy Year | Per Cent. of Premiums in the Second to the Sixth Policy Year, Inclusive |
|-----------------------|--|---|
| Whole Life | 35 | 5 |
| 20-Payment Life | 20 | 5 |
| 15-Payment Life | 20 | 5 |
| 10-Payment Life | 20 | 5 |
| 20-Year Endowment | 20 | 5 |
| 15-Year Endowment | 20 | 5 |
| 10-Year Endowment | 15 | 5 |

Section 4. That on renewal premiums for the eleventh and subsequent policy years, on Regular policies and for the seventh and subsequent policy years on Intermediate policies collected through his agency, on new business effected by or through the Manager under this contract, the Manager shall be entitled to a collection fee of two per cent. (2%) of such premiums, but the payment of such collection fee shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract.

Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected otherwise than by the Manager during the continuance of this contract, a collection fee of two per cent. (2%) of such premiums shall be deducted from the commission to be allowed or provided in Section 3.

Provided further, that on premiums on business not issued by or through the Manager, but transferred to him for collection, he shall be allowed a collection fee of two per cent. (2%) of the premiums, which collection fee, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums.

Section 5. That if this contract shall be terminated for any cause, except violation of its conditions, the commissions on the balance of the first year's premiums on policies issued through the Manager remaining unpaid at the termination of this contract, shall be payable to the Manager, his executors, administrators or assigns, subject to the conditions of Section twenty-three (23).

Section 6. That if this contract shall be terminated for any cause other than violation of its conditions, or the death of the Manager, and the Manager has been continuously in the service of the Company for two or more years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the tenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated by the death of the Manager and if he has been continuously in the service of the Company for two or more years, the Company will continue to pay to his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the fifteenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions before the Manager shall have been continuously in the service of the Company for two years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Intermediate policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

Section 7. That if the Manager shall at any time violate any of the conditions of this contract, he shall forfeit all commissions which would thereafter have become payable under this or any previous contract.

Section 8. That if the Manager, at any time after the notice of the termination of this contract, shall take any action toward inducing the agents of the Company to leave its service, or make any attempt to induce its policyholders to relinquish their policies, he shall forfeit all commissions which would thereafter have become payable under this or any previous contract.

Section 9. That no commission shall be paid to the Manager on any policy after it has been canceled or become paid-up. But if the Manager, while in the employ of the Company under this contract, shall secure the revival of any policy issued under this contract, after such policy has been canceled, he shall be entitled to the commission on such policy as provided in Sections three (3) and four (4) as though policy had not been canceled.

Section 10. That the Company may make any change in its methods of conducting its business, may divide the territory heretofore mentioned and make any other appointments therein.

Section 11. That the Manager shall not insert or authorize the insertion of any advertising matter in any publication whatever, or issue or circulate or authorize the issuing or distribution of any circulars or papers, or write or authorize the writing of any letters to any publication respecting any life insurance company, and that the Manager shall not use or authorize the use of language, orally or in writing, respecting any company tending to bring such company into disrepute.

Section 12. That the Manager shall send to the Company on each copy of all contracts and amendments thereto entered into with agents, that when contracts are terminated, the Manager shall notify the Agent by letter of such termination and shall immediately send to the Company a copy of such letter together with termination form; that such agents shall have no claim against the Company, but in case of the termination of this contract the Company may and is empowered to carry out at its option any agreements as to the payment of renewal commissions contained in the contracts of any agents which may have been terminated by the termination of this contract, and that all payments made to agents by the Company or account thereof shall be deducted from the amounts payable to the Manager, his executors, administrators or assigns, by the terms of this contract; that the Manager shall in no case make a contract with an agent providing for greater compensation than that provided for in this contract, that the Company will not approve any contract between the Manager and an agent in which renewal commissions on Regular policies have been allowed beyond the tenth year of insurance or in which renewal commissions on Intermediate policies have been allowed beyond the sixth year of insurance. And the Manager further agrees to promptly terminate any contract or agreement with an agent when requested by the Company so to do.

Section 13. That the branch office occupied by the Manager shall be subject to the Company's control. If a written lease is required, it must be in the Company's name and a copy filed at the Home Office, and the Manager shall not negotiate a lease unless authorized in writing by the Company so to do. In case there is no written lease, the office is to be wholly under the control of the Company. These conditions apply whether the Manager or the Company pays the rent.

Section 14. That the Manager shall be governed in the business of his agency by the written and printed instructions and rules which he may from time to time receive from the Company, that he shall keep correct accounts and records of all business done and moneys collected, and that all books, accounts, documents, vouchers and other papers connected with the business of the Company are and shall be its property, and at any time open to the inspection and examination of its authorized representative, and that the Manager shall report to the Company in writing, at such times as he may be instructed so to do the collection of all premiums on policies and receipts sent to him for collection to the date of such accounting.

Section 15. That all moneys or securities received or collected for or on behalf of the Company, after making such deductions as are herein allowed, shall be held by the Manager as a fiduciary trust, and shall not be used by him for any purpose whatsoever, except as herein specifically authorized, but shall be immediately deposited, in a bank designated by the Company, to the credit of The Prudential Insurance Company of America, or shall be paid over to such person as the Company may designate.

Section 16. That the Manager shall not incur or authorize the incurring of any expense or expenditure whatever on account of this Company without the written authority of the Company.

Section 17. That the Manager has no authority on behalf of the Company to make, after or discharge any policy, to extend the time for paying a premium, to waive forfeitures, to incur any liability on behalf of the Company, to allow the delivery of any policy when the applicant be in good health and the first premium paid in full, or to receive any money due or to become due to the Company except on policies and renewal receipts signed by the President, one of the Vice Presidents or the Secretary of the Company and sent to him for collection.

Section 18. That, unless otherwise terminated, this contract may be terminated by either party by a notice in writing delivered personally, or mailed to the other party at the last known address, at least thirty days before the date therein fixed for such termination. In case the Manager fails to comply with any of the duties, conditions or obligations of this contract the Company may terminate same upon immediate notice.

Section 19. That when policies issued under this contract are changed and allowance is made on an old policy and applied on a new policy, no commission shall be paid on the amount thus allowed, unless authorized by the Company, that if the Company shall return premiums on a policy issued under this contract, the Manager shall repay to the Company, on demand, the amount of commissions received on the premiums so returned.

Section 20. That an assignment of commissions earned or accrued or to accrue under this contract shall be valid unless authorized in writing by the Company.

Section 21. That if this contract be terminated, the compensation paid to the Manager, with the amount then due him under this contract, shall be in full settlement of all claims and demands in favor of the Manager under this contract, and that all compensation which a continuance of this contract might have secured to him shall be forfeited, except as herein provided.

Section 22. That the Manager shall not pay or allow, or offer to pay or allow, as an inducement to any person to insure, any rebate of premium or any inducement whatever not specified in the policy.

Section 23. That the Company shall have and is hereby given a first lien upon any commissions or claims for commissions under this or any prior contract, as security for the payment of any claims due or to become due to the Company from said Manager, and the Manager shall pay interest on any out standing indebtedness at the rate of five per cent (5%) per annum, the interest to be computed at the end of each contract year on the average indebtedness existing during such year.

Section 24. That when a policy issued under this agreement is the cause, directly or indirectly, of the cancellation of a policy previously issued by the Company, the Company reserves the right to adjust the payment of commissions as the circumstances of the case seem to warrant.

Section 25. That no compensation shall be allowed on any premium, or portion thereof, payment of which is waived because of the Disability clause contained in the policy.

Section 26. That this contract shall take effect on the fourth day of AUGUST 1919 when signed by the Manager and executed on behalf of the Company by the President and one of the Vice Presidents or by the President and the Secretary.

In Witness Whereof, the parties to this contract have executed the same in duplicate on the day and year first above written.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Party of the First Part.

Countersigned by

Robert R. ...

Assistant Secretary

Arrest A. Sydes
President

Edward Gray
Vice President

Claude W. ...
Party of the Second Part.

MANAGER'S CONTRACT

BETWEEN

THE PRUDENTIAL INS. CO. OF AMERICA

(Incorporated in the State of New Jersey)

AND

Claude R. Good
Manager

EXAMINED

William

AUDITOR'S DEPT. *William* President
COMMISSION DEPT.

55
Ex B

40
Es



The Prudential Insurance Company of America

Incorporated under the laws of the State of New Jersey

EDWARD D. DEWEIN, President

HOME OFFICE, NEWARK, NEW JERSEY

IT IS HEREBY AGREED by and between The Prudential Insurance Company of America, and C. W. POORE, Manager for the said Company, that in consideration of the surrender by each of the said parties of their respective rights under all provisions in the existing contract, as heretofore amended, between the said Company and the said Manager concerning the payment of collection fees and the payment of commissions after termination of said contract, as heretofore amended, such provisions are hereby repealed and terminated as of the date of the execution of this agreement, and in place thereof the following provisions are hereby substituted effective from the date hereof.

Collection Fees.

That after commissions, upon policies written by or through said Manager, are no longer payable under the contract, as heretofore amended, of which this is an amendment, and as amended hereby, and hereinafter referred to as this contract, the said Company shall pay to the said Manager a collection fee of two per cent. (2%) of the premiums of all such policies and upon premiums of all policies transferred to him for collection, when in either case such premiums are collected by or through him, excepting that such collection fee on premiums in any policy year on group insurance policies shall be two per cent. (2%) of the first \$50,000 of the premiums of each such policy, and one per cent. (1%) on the next \$150,000 of premiums of each such policy, but no collection fee shall be payable on any part of such premium which is in excess of \$200,000; nor, except as hereinafter provided, shall a collection fee be paid to said Manager upon any premiums when collected by or through his agency under this contract concerning which said Company has waived, by agreement, its right to deduct any collection fee from the commissions payable to some other Manager or his estate, where such waiver is in accordance with the agreement of said Company with such other Manager; and only one per cent. (1%) collection fee shall be payable to said Manager on any premiums concerning which the Company has agreed to deduct but one per cent. (1%) from the commissions payable to some other Manager or his estate.

Terminal Commissions.

That if this contract be terminated the compensation to be paid the Manager thereafter shall be:

(a) If terminated by the death of the Manager, his retirement at age 65 or later, his total and permanent disablement, or the withdrawal of the Company from the territory set forth in this contract, the Company will pay the Manager, his executors, administrators or assigns, commissions when and as set forth in this contract, less a collection fee of one per cent. (1%); provided, however, that where the Manager is obligated to pay an agent or a broker a renewal commission of five per cent. (5%); or a renewal commission of two and one-half per cent. (2½%) or more upon premiums on which said Manager is entitled under this contract to but five per cent. (5%) renewal commission, no collection fee shall be deducted from the said commissions as set forth in this contract, during the period for which such renewals are payable to the said agent or broker.

(b) If terminated for any cause other than those mentioned in Paragraph, a or c hereof, the Company will pay to the Manager, his executors, administrators or assigns, commissions, when and as set forth in this contract, up to and including but not beyond the tenth policy year, less a collection fee of two per cent. (2%), provided, however, that if the Manager has not been continuously in the service of the Company for at least two years no such commissions will be payable beyond the sixth policy year.

(c) If terminated because he has paid or offered to pay or allow as an inducement to any person to insure any rebate of premium, or if the Manager either during the continuance or after the termination of this contract shall default in the payment to the Company of premiums collected by him or shall take any action towards inducing the Agents of the Company to leave its service or make any attempt to induce its policyholders to relinquish their policies, he shall forfeit all commissions which have otherwise been reserved to him by this or any previous contract.

IN WITNESS WHEREOF the parties hereto have executed this amendment in duplicate on the 27th day of July, 1927.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

By

Edward D. Dewein
Assistant Secretary

Edward Poore
Manager

EXHIBIT D

The Prudential Insurance Company of America

Edward D. Duffield, President

Home Office: Newark, N. J.

Claude R. Fooshe, Manager

St. Louis Ordinary Agency

601-610 Mississippi Valley Trust Building

506 Olive Street

Main 0695

St. Louis, Mo.

February 23, 1938

Mr. G. H. Chace, Vice Pres.

Ordinary Agencies,

Newark, N. J.

[Initialed]: SM C

Dear Mr. Chace:

I am wiring you tonight stating that I have decided to accept transfer to Los Angeles.

I would just like to check to see if I understand correctly. I am to receive \$1.00 per thousand bonus on all net increase made. I am to receive 5% on commissions paid agents, first year. Further, I am to receive a salary which was not yet determined, but which I believe you intimated would be in excess of \$500 per month. The amount in excess of same, though, I believe you wanted to get some figures pertaining to this agency or that one out there. Anyway, I don't believe this was definite.

I know you will take into consideration what I am turning over to the Company here as well as my length of service and, further, I know you realize that I will do a job for the Company such as they

would expect me to do. So, I will await your advise on the salary, but will delay nothing awaiting that.

I understand, further, that the Company will pay all office expenses, Assistant Managers, and will allow me commissions on my own business. I did not get word from Mr. MacLeod, though, as to how you treat a new terms Manager pertaining to renewals. I know though, that it would be treated the same as other mngrs. I presume they will pay any traveling expenses incurred for visiting agents.

I do not want to make a whole lot of requests. One though, I would like you to please grant from the outset, and that is to allow me as liberal an arrangement for making contracts as possible, so that I will not be handicapped by the other office being able to do what I can't do. With my experience, I feel sure you will, at an early date, permit me to try out a plan of some advances. I hope you will see fit to do this, inasmuch as I have done a great deal of it on my own part and have been fairly successful.

I realize you are going to be away from the Home Office after the end of this week. I would appreciate your writing me, before leaving or have Mr. MacLeod answer it in detail. Naturally, there will be a lot to do on my part in making the transfer. Whether or not you would rather I would go out there and stay a month and then come back here and stay a week or ten days and then go to the Convention from here, rests entirely with you. I do believe this would be a better arrangement, as weather conditions would be more favorable the latter part of April or [27]

Mr. Chace, page 2.

the first of May to show my place. I could stay there, say from March 15 until April 15 or 20. Mrs. Fooshe would not go with me at that time. She would join me later or go out with me after I get back from the Convention. This would let me get things well lined up in Los Angeles. You might advise me by Air Mail when you would like me to make the transfer effective.

My thought was, that if I did this, then any problems arising, I could get straightened out when I came back to attend the Convention. A lot of this would depend, of course, as to whether or not Mr. MacLeod went out with me to introduce me. Frankly, I do not think this necessary. I would like him, however, to visit this agency prior to the time I left, if possible.

This has been quite a decision to make, but I feel it will be a wise one for Mrs. Fooshe and myself for the future, and I further feel that I will be able probably, to be of more value to the Company there than I would be here.

I will appreciate your writing me by Air Mail so I will get it by Saturday, if it is at all possible.

With kindest personal regards, I am,

Very truly yours,

CLAUDE R. FOOSHE,

Manager.

CRF:ms

P. S. I understood I would receive the full renewals same as had I remained here only the Co.

will bear expense for collecting to the 10th yr. I presume all of this is set out in a letter so will leave it all with you. CRF. [28]

EXHIBIT E

The Prudential Insurance Company
of America

Edward D. Duffield, President
Home Office, Newark, New Jersey

Ordinary Agencies

George H. Chace

Second Vice President

Albert E. N. Gray

Assistant Secretary

Sayre MacLeod, Jr.

Theodore D. Miller

Arthur L. Stephans

Robert E. Wilkins

Supervisors

Walter D. Lemon

Assistant Supervisor

February 24, 1938.

Personal

Mr. C. R. Fooshe, Manager,
St. Louis, Mo.

Dear Mr. Fooshe:

While I am personally dictating this letter, I shall be out of the office before it is written, so Mr. MacLeod will sign for me.

Replying to your letter of yesterday's date, you have a correct understanding of the contingent compensation, except that you will note from the enclosed copy of the New Terms Manager's contract that it goes a little further than you thought in that the 5% is paid also on the Manager's commissions.

We feel that we can justify a starting salary of \$600 a month in the light of the business at present in force and what production has been of recent years. It is customary to consider the guaranteed salary of each New Terms Manager at the close of each fiscal year and make additions to the salary where the size and the record of the Agency warrants it. This does not necessarily mean that you will receive an increase in guarantee at the end of your first fiscal year. It is contemplated that year by year an increasing proportion of the Manager's compensation from the Agency should come from contingent sources rather than that he should rely on increases to his guarantee in order to increase his total income.

You are correct in your understanding that the Company will pay the salaries of the Assistant Managers, postage, telephone and the necessary travel expense in visiting outside Agents. In fact, it is customary to pay all the regular expenses in a New Terms office except some minor incidentals which might amount to a few hundred dollars a year, such as subscriptions to insurance magazines, insurance services, etc. Rather than to try to itemize all the small incidentals that we do not pay, we suggest that

experience will show you which ones we do not cover and which ordinarily amount to only a few hundred dollars a year.

On his personal business the New Terms Manager receives full renewal commissions.

As to the type of Agent's contract, I am enclosing a copy of the form that will be used in Los Angeles. You will note from this that in some respects it is more liberal than the contracts made between Old Terms Managers and Agents. [29]

-2-

Mr. C. R. Fooshe, Manager, February 24, 1938.

With this type of Agent's contract, the Manager has very little protection in advancing money to an Agent until by his production he has built up a considerable amount of renewal income. We have not yet seen any way to get around this particular difficulty.

We have given some thought as to when you might take charge of the Agency. It seems to us as though very little would be gained by your hurrying out there. It would seem better for you to remain in the St. Louis Agency until after the Home Office Convention, which is scheduled for the last week in April. The change might be made officially for May 1 or possibly May 2, in view of the fact that May 1 is a Sunday. In the meantime not much, if anything, would be lost by leaving Mrs. Reeder in charge in the Los Angeles office as the Acting Manager. How would this arrangement appeal to you?

Referring to your postscript, you are correct in your understanding that full renewals will be paid on the business in the St. Louis Agency after the termination of the Old Terms contract, just as though the contract remained in force. In other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions. Naturally, the collection fee that you would receive if you remained in St. Louis under the Old Terms contract on business on which your renewal interest has expired would be discontinued.

We are pleased with your decision to take the Los Angeles Agency and while I shall have an opportunity to wish you well there before you go out, I should like to get the good wishes to you at this time in a preliminary way.

Cordially yours,

GEO. H. CHACE

SM

Second Vice President.

GHC :EK [30]

EXHIBIT F

The Prudential Insurance Company of America
Edward D. Duffield, President
Home Office, Newark, New Jersey

Ordinary Agencies

George H. Chace
Second Vice President

Albert E. N. Gray
Assistant Secretary

Sayre MacLeod, Jr.

Theodore D. Miller

Arthur L. Stephans

Robert E. Wilkins

Supervisors

Walter D. Lemon

Assistant Supervisor

March 14, 1938.

Mr. C. R. Fooshe, Manager,
St. Louis, Mo.

Dear Mr. Fooshe:

In view of your acceptance of the offer made by Mr. Chace to appoint you Manager for the Company at its Los Angeles "A" Office under a New Terms Manager's form of contract, effective May 2, 1938, notice is hereby given in accordance with the terms of your current contract that the said current contract will be terminated as of the thirtieth day of April 1938.

Cordially yours,

A. E. N. GRAY

Assistant Secretary.

EXHIBIT G

The Prudential Insurance Company of America
Home Office, Newark, New Jersey

George H. Chace
Vice President

April 17, 1940.

Mr. C. R. Fooshe, Manager,
Los Angeles, Calif.

Dear Mr. Fooshe:

To clarify the point you raised while at the Home Office, I would inform you that your change as Manager from St. Louis to Los Angeles was simply a transfer and did not of necessity involve the termination of the original contract. It was felt, however, that the change to the new form of contract would be best for all concerned. This was mutually agreed upon. As a consequence, the old contract was terminated without any surrender charge and the new contract was put into effect.

Very truly yours,

(Signed) GEORGE H. CHACE

Vice President.

GHC:EKL [33]

EXHIBIT H

Treasury Department

Affidavit

Re: Claude R. Fooshe

State of New Jersey

County of Essex—ss

George H. Chace, being duly sworn upon his oath according to law deposes and says:

I am a Vice-President of The Prudential Insurance Company of America, in charge of Ordinary agencies.

Early in 1938, when Mr. Claude R. Fooshe was contemplating a transfer from the managership at St. Louis to that at Los Angeles, he discussed with me the remuneration he would receive, in the event of transfer under the "New Terms" manager's contract under which he would have to operate in Los Angeles. The "New Terms" contract provides for a guaranteed monthly salary and certain contingent commissions, and Mr. Fooshe was dubious about leaving St. Louis and giving up his "Old Terms" contract for the salary of \$600 a month then tentatively proposed.

Because of his ability and long experience as a manager for the Company, Mr. Fooshe was justified in his position; on the other hand, the Company preferred not to commit itself to the indefinite payment of any larger guaranteed salary.

The contract then existing between Mr. Fooshe and the Company was dated August 4, 1919. A printed amendment of May 17, 1927, provided, in effect,

that should the contract be terminated under paragraph (b) of such amendment, the Company would pay to Mr. Fooshe the renewal commissions scheduled in his contract (as amended), up to and including the tenth policy year, less a collection fee of 2%.

It was agreed that Mr. Fooshe should receive a guaranteed salary of \$600 per month and in order that his income would not suffer [34] a reduction by reason of his acceptance of the managership at Los Angeles, the Company agreed to waive the imposition of the 2% collection fee on renewal commissions payable on business issued through the St. Louis Agency, as set forth in paragraph (b) of the amendment referred to above. This arrangement was agreeable to Mr. Fooshe. It was felt by waiving this 2% collection fee that the amount that would accrue to Mr. Fooshe together with the guaranteed salary to be paid him would be ample compensation for the supervision of the Los Angeles Agency. Further, while the collection fee would eventually cease, in the interim Mr. Fooshe would have an opportunity to develop the Los Angeles agency and, if successful, would in due course have built up his income to approximately what it would have been had he continued at St. Louis.

This is the agreement to which Mr. Fooshe referred in the postscript to his letter of February 23, 1938.

GEORGE H. CHACE

Subscribed and Sworn to before me this 25th day of October, 1940.

WILSON J. McDONALD

Notary Public of New Jersey

My Commission Expires

August 4, 1943 [35]

[Title of Board and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties to the above-entitled case, through their respective counsel, as follows:

18. That Claude R. Fooshe, petitioner, is, and was during the entire year of 1938 and for many years prior thereto, married to Lura D. Fooshe.

19. That petitioner and his wife, Lura D. Fooshe, are and have been residents of and domiciled in the State of California since May 1st, 1938.

20. That one-half the sum of \$21,504.80 involved in this proceeding was returned on each of the separate income tax returns of Claude R. Fooshe and Lura D. Fooshe.

JOHN L. WHEELER

Counsel for Petitioner

(Signed) J. P. WENCHEL

EAT

Chief Counsel

Bureau of Internal Revenue

Counsel for Respondent

[Endorsed]: U.S.B.T.A. Filed Dec. 9, 1941. [36]

[Title of Board and Cause.]

FINDINGS OF FACT AND OPINION

Docket No. 106640. Promulgated January 27, 1942.

Petitioner, the manager of an insurance agency in a noncommunity state, was induced to accept an agency in California by the agreement of the company to waive its right to collection charges upon renewal commissions earned in the noncommunity state and payable as collected to the petitioner while employed as manager. Held, that such commissions paid without deduction of the company's collection charge to the petitioner while employed by the company in California, had their inception in the noncommunity state and constituted separate property of the petitioner.

John L. Wheeler, Esq., for the petitioner.

Frank T. Horner, Esq., for the respondent.

This proceeding involves income taxes for the calendar year 1938. Deficiency was determined in the amount of \$1,436.37. The petitioner contends that there was error as to only a portion thereof. The question presented is whether the major portion of \$21,504.80, income received during the taxable year is community income under the law of California. Upon brief the petitioner concedes that a minor part (approximately one-fifth) of the above amount was by the Commissioner properly included in income.

FINDINGS OF FACT.

The parties filed a stipulation of facts which, together with certain exhibits referred to therein and attached thereto and received in evidence, constitute all of the evidence adduced. The exhibits are extensive, and we should not merely adopt them in extenso as findings. We therefore adopt and make a part of our findings the stipulation, and summarize the exhibits, so far as pertinent, as follows:

The parties stipulate and we find:

1. The petitioner is at present, and has been since about the first of May, 1938, manager of an ordinary agency, at Los Angeles, California, of the Prudential Insurance Company of Newark, New Jersey, under certain agreements in [37] this stipulation mentioned, entered into by and between the said Prudential Insurance Company and the petitioner. Under date of April 25, 1938, a contract was entered into by and between the petitioner and the said company, effective on or about May 1, 1938. A copy of this contract is attached as Exhibit A, and may be received in evidence.

2. On or about August 4, 1919, the Prudential Insurance Company and the petitioner entered into a contract with respect to his services as manager of an ordinary agency at St. Louis, Missouri. A copy of this contract is attached as Exhibit B, and may be received in evidence.

3. On or about May 17, 1927, the contract of

August 4, 1919 (Exhibit B, paragraph 2 hereof), was amended. A copy of this amendment is attached hereto as Exhibit C, and may be received in evidence.

4. In order to provide some inducement to the petitioner to relinquish his position in St. Louis, Missouri, and assume the management of an ordinary agency in Los Angeles, California, it was agreed that the petitioner would be paid the full terminal commissions on renewal premiums under the contract of 1919 (Exhibit B, paragraph 2 hereof) without deduction by the said insurance company of the collection fee of two percent. No formal written agreement, in the form of a contract, was executed by the parties. However, the agreement just referred to was expressed in a letter written by the petitioner at St. Louis, Missouri, under date of February 23, 1938, and addressed to the Prudential Insurance Company, a copy of which is attached hereto as Exhibit D, and may be received in evidence.

5. In a letter dated February 24, 1938, the Prudential Insurance Company replied to the petitioner's letter (Exhibit D, above), confirming the understanding of the petitioner as expressed in the above-mentioned letter (Exhibit D). A copy of the said reply is attached hereto as Exhibit E, and may be received in evidence.

6. On March 14, 1938, the Prudential Insurance Company addressed the petitioner, a copy of which

communication is attached hereto as Exhibit F, and may be received in evidence.

7. Pursuant to the agreements and contracts referred to in this stipulation, the petitioner came to California from St. Louis, Missouri, on or about May 1, 1938, to perform the services in Los Angeles, California, provided for under the said agreements and contracts.

8. Prior to May 1, 1938, the petitioner was the St. Louis, Missouri, manager of an ordinary agency of the Prudential Insurance Company of Newark, New Jersey, under a contract executed in 1919 and amended in 1927 (Exhibits B and C).

9. Between the time of the petitioner's arrival in Los Angeles, California, on or about May 1, 1938, to assume his new duties, and the end of the taxable year 1938, which year is involved in this proceeding, the petitioner received from the Prudential Insurance Company of Newark, New Jersey, the sum of \$21,504.80, all of which has been included by the respondent in the taxable income of the petitioner for 1938. This sum of money represented the equivalent of two and one-half per cent of the premiums collected in the said St. Louis ordinary agency after April 30, 1938, and paid by policyholders on policies issued while the petitioner was manager of the ordinary agency of the said insurance company at St. Louis, Missouri, under the contracts herein mentioned (Exhibits B and C).

10. At the close of business December 31, 1937, there was in force in the ordinary agency at St.

Louis, Missouri, in the territory of which the petitioner [38] had charge, \$49,122,406.00 of life insurance issued by the Prudential Insurance Company, of which amount the sum of \$5,153,004.00 represented new life insurance written under the supervision of this petitioner during the year 1937.

11. At the close of business December 31, 1937, the territory in Los Angeles, California, to which the Prudential Insurance Company later transferred the petitioner as a manager of an ordinary agency had in force life insurance issued by the Prudential Insurance Company in the amount of \$29,077,437.00, of which amount \$846,237.00 represented new life insurance issued in said Los Angeles territory during the year 1937.

12. In 1938, the standard form of ordinary manager's contracts used by the Prudential Insurance Company was different from that in use in 1919. Acceptance by the petitioner in this case of the Los Angeles managership of an ordinary agency, solely on the basis of the said standard new form of contract in use in 1938, and without any change in the 1919 contract (Exhibits B and C), would have resulted in a substantial decrease in the petitioner's compensation immediately after his arrival in Los Angeles, California, because of the fact that less life insurance was in effect in said Los Angeles agency than had been in effect in St. Louis, and, also, on the basis of the new life insurance issued in 1937 in said Los Angeles agency, the said new insurance to be issued in the following year (1938)

would probably have been less than had been written during the last year (1937) of Mr. Fooshe's managership in St. Louis, Missouri.

13. In response to a request of the petitioner for information as to the reason for the termination, by the Prudential Insurance Company, of his St. Louis, Missouri, contract of 1919 (Exhibit B), the Prudential Insurance Company advised Mr. Fooshe, the petitioner, under date of April 17, 1940, a copy of which communication is attached hereto as Exhibit G, and may be received in evidence.

14. If the Prudential Insurance Company had not waived its right to deduct the collection fee of two per cent from the terminal commissions payable to the petitioner under the St. Louis ordinary managership contract of 1919, after Mr. Fooshe assumed the new position in Los Angeles, California, the petitioner would still have been entitled to the net amount representing one-half per cent of the renewal premiums collected by the said St. Louis office, of which the petitioner was manager until about the first of May, 1938.

15. The contract between the Prudential Insurance Company and the petitioner, which was executed on August 4, 1919 (Exhibit B, paragraph 2 hereof), provided for the payment by the Prudential Insurance Company to its manager the commissions specified therein of the renewal premiums on insurance policies issued, of which percentage the manager of the ordinary agency, in this case the petitioner, was entitled to receive personally and

retain for his personal use only two and one-half per cent, the balance being paid to the particular agent writing the insurance. While the amount to be retained by the manager varies in certain instances, yet for the purposes of this particular case, the parties agreed that the Board may accept as a fact, as a basis for its consideration and determination of the issue in this case, that the petitioner's commissions on the collection of premiums on the policies written under his supervision while manager at St. Louis, amounted to two and one-half per cent.

16. The return of the petitioner for the year 1938 was filed with the United States Collector of Internal Revenue at Los Angeles, California.

17. Attached is a copy of an affidavit of George H. Chace, executed October 25, 1940, marked Exhibit H, and may be received in evidence.

18. That Claude R. Fooshe, petitioner, is, and was during the entire year of 1938 and for many years prior thereto, married to Lura D. Fooshe. [39]

19. That petitioner and his wife, Lura D. Fooshe, are and have been residents of and domiciled in the State of California since May 1st, 1938.

20. That one-half the sum of \$21,504.80 involved in this proceeding was returned on each of the separate income tax returns of Claude R. Fooshe and Lura D. Fooshe.

From the exhibits to which the above stipulation refers, we further find:

Exhibit A, the contract of August 4, 1919, between the petitioner and the Prudential Insurance

Co. (hereinafter called the company) provided, in sum, that the manager should devote his entire time, talent, and energies to the company's business, that his compensation should be a commission on premiums collected on policies written by or through the petitioner under the contract, to be paid during the continuance of the contract and only upon condition that the manager, as such, remain continuously in the employ of the company, and that the commission should be according to a certain schedule (set forth in section 3) until and including the fifteenth policy year. As to later years, section 4 provides:

Section 4. That on renewal premiums for the sixteenth and subsequent policy years on Regular policies and for the seventh and subsequent policy years on Intermediate policies collected through his agency, on new business effected by or through the the Manager under this contract, the Manager shall be entitled to a collection fee of two per cent. (2%) of such premiums, but the payment of such collection fees shall be subject to discontinuance at any time in the event of the Company making other arrangements for the collection of the premiums, and, if not previously discontinued, shall cease upon the termination of this contract.

Provided, however, that when premiums, either first or renewal, on policies issued under this contract are collected otherwise than by the Manager during the continuance of this contract, a collection fee of two per cent. (2%) of such premiums shall

be deducted from the commission to be allowed as provided in Section 3.

Provided further, that on premiums on business not issued by or through the Manager, but transferred to him for collection, he shall be allowed a collection fee of two per cent. (2%) of the premiums, which collection fees, however, may be discontinued at any time in the event of the Company making other arrangements for the collection of the premiums.

Section 6 reads:

Section 6. That if this contract shall be terminated for any cause other than violation of its conditions, or the death of the Manager, and the Manager has been continuously in the service of the Company for two or more years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Regular policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the tenth year of the insurance shall have been paid, subject to the conditions of Section twenty-three (23). [40]

That if this contract shall be terminated by the death of the Manager and if he has been continuously in the service of the Company for two or more years, the Company will continue to pay to his executors, administrators or assigns, the commissions upon renewal premiums on Regular poli-

cies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the fifteenth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions before the Manager shall have been continuously in the service of the Company for two years, the Company will continue to pay to the Manager, his executors, administrators or assigns, the Commissions upon renewal premiums as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

That if this contract shall be terminated for any cause other than violation of its conditions, the Company will continue to pay to the Manager, his executors, administrators or assigns, the commissions upon renewal premiums on Intermediate policies as set forth in Section three (3) less a collection fee of two per cent. (2%) of such renewal premiums, until the commissions on the premiums in the sixth year of insurance shall have been paid, subject to the conditions of Section twenty-three (23).

Though an amendment of the contract, which was executed in 1927, was placed in evidence, we find nothing therein which is material herein. The parties

have stipulated all pertinent facts in the contract (Exhibit A) executed April 25, 1938.

Prior to the agreement of April 25, 1938, a letter and postscript (Exhibit D), was written by the petitioner to G. H. Chace, vice president of the company, expressing the agreement as to payment to the petitioner of full terminal commissions (2½% to petitioner) under the old contract, without deduction of the 2 percent collection fee by the company. In material part that letter, dated February 23, 1938, reads:

P.S. I understood I would receive the full renewals same as had I remained here only the Co. will bear expense for collecting to the 10th yr. I presume all of this is set out in a letter so will leave it all with you.

To such letter G. H. Chace responded on February 24, 1938 (Exhibit E), in material part:

Referring to your postscript, you are correct in your understanding that full renewals will be paid on the business in the St. Louis Agency after the termination of the Old Terms contract, just as though the contract remained in force. In other words, no collection fee will be imposed on the business for which you have qualified for renewal commissions. Naturally, the collection fee that you would receive if you remained in St. Louis under the Old Terms contract on business on which your renewal interest has expired would be discontinued.

In view of the petitioner's acceptance of the offer to appoint him manager at Los Angeles, the com-

pany on March 14, 1938, gave notice [41] (Exhibit F) of cancellation of the old contract. On April 17, 1940, the company wrote the petitioner a letter (Exhibit G), stating in effect that the change to the new contract did not of necessity involve limitation of the old, but that as a change to the new form of contract was mutually felt to be best for all, the old contract was terminated without any surrender charge and the new contract put into effect. The contract entered into between the company and petitioner on April 25, 1938, provided compensation to him on the basis of \$600 per month salary guaranteed to be paid, plus contingent commissions largely based on first year commissions.

The parties stipulated that an affidavit by G. H. Chace (Exhibit H) should be received in evidence. In material part it reads as follows: that early in 1938 the petitioner, in contemplating the change to the Los Angeles managership, was dubious about leaving the position at St. Louis for a salary of \$600 per month and contingent commissions; that in order that his income would not suffer a reduction by the move to Los Angeles, the company agreed to waive the imposition of its 2 percent collection fee on renewal commissions payable on business issued through the St. Louis agency; that it was felt that by waiving the 2 percent collection fee, the amount accruing to Fooshe, together with guaranteed salary to be paid him, would be ample compensation for his supervision of the Los Angeles agency, and that while the collection fee would even-

tually cease, in the meantime Fooshe would, if successful, develop the Los Angeles agency and build up his income to approximately what it would have been had he continued at St. Louis.

OPINION.

Disney: It is the petitioner's position that the services for which the sum of money here involved was received were rendered in California, under the agreement by which he took over the Los Angeles agency, and therefore the money is community income; while the respondent argues that the money was received under a contract having its inception in a noncommunity state, and therefore the money is petitioner's separate property. There can be no doubt that the decline in petitioner's income which would ensue from acceptance of the Los Angeles agency was the reason for the waiver by the company of the imposition of its 2 percent collection fee; nor is there doubt that in order to secure the benefit of such waiver the petitioner must continue as a manager in the employ of the company. But does it follow therefrom that the moneys here involved constitute additional compensation for the services performed while the community existed in California? We find the question close and interesting, but after much consideration we come to the conclusion that the petitioner has [42] not shown the income to be earnings of petitioner while a member of a marital community in California. The answer depends largely upon whether what was done in Cali-

for California constituted earning the income, or merely fulfillment of a condition inhering in a contract having its inception in another, noncommunity, state. Obviously, the income had a connection, not only with the original contract of 1919, but with that of 1938, resulting from the correspondence early in that year and prior to the contract of April 25, 1938, all outside the State of California.

The 2½ percent to which, before deduction of collection fee by the company, the petitioner was entitled, was based upon services rendered at St. Louis. The company waived the 2 percent collection fee prior to the services in Los Angeles, subject to a condition—rendition of managerial services (in Los Angeles as it transpired). We think that the inception of the earning was the old contract and services outside of California, and that there was, in California, only performance of the condition, and not earning of compensation without base in a noncommunity state. The waiver of the collection fee was, in our opinion, mere inducement, not an addition to compensation earned in California. If the earnings have their inception in a noncommunity state, there appears to be no requirement that nothing whatever can transpire in the community state without making the income that of the community. In *Creamer v. Briscoe*, 109 S. W. 911, the first community settled upon land and did everything required for homestead purposes, except to complete the time requirement as to possession. The wife died, the husband remarried and a second community completed

the necessary occupancy and secured the patent. The property was held to have been acquired by the first community. The authority seems well settled to the effect that performance in a community state of a condition involved in a contract made in a non-community state leaves the property noncommunity. In Sara R. Preston, 35 B. T. A. 312, we quoted McKay on Community Property, § 517, as follows:

* * * when a right, legal or equitable, is acquired whether before or during marriage, all things of value into which the initial right develops by the performance of conditions, the running of time or the like, or into which it is converted by an assignment, or if the initial right rests in obligation, all that which is obtained through the performance, discharge, satisfaction, enforcement or assignment of the obligation, are deemed in law to have been acquired as of the date of the acquisition of the initial right, and take the character, as separate or common, of that right.

Section 520 of the same work is quoted by us in John M. King, 26 B. T. A. 1158 (affd., 69 Fed. (2d) 639), as follows:

An inchoate title or pecuniary right is property in the sense of the law of separate and common property, just as truly as the most unimpeachable or perfect [43] title. It takes its rank as separate or common property, for the same reason, and in response to the same tests, as the perfect or complete title or right, and it retains its character as separate or common so long as it can be traced; *its development*

from an inchoate to the absolute or complete form does not shift it from one fund to another; it may be relieved of conditions and burdens but this does not change its character; it may pass from a conditional to an unconditional form, without change or legal character; it may be exchanged for other things or rights, and its character as separate or common passes to whatever was acquired by the exchange. If the property consists of an obligation, either contractual or delictual, it may be performed or enforced; and whatever is so acquired takes the same character as the obligation. (Italics supplied.)

We think that the petitioner herein had, prior to the inception of the community in California, an inchoate right which was property, albeit subject to condition, and that under the above authority the inception of the income was in the previous contract and services, and not the earnings in California. The rationale of the above quotations seems to have been consistently followed, though the circumstances differ. See William Semar, 27 B. T. A. 994; W. L. Honnold, 36 B. T. A. 1190; Albert J. Houston, 31 B. T. A. 188 (D. C. California) citing a number of cases. In our opinion, this proceeding involves, not additional compensation earned in California, but performance of a condition involved in the contract wherein the amounts involved have their inception. We therefore hold that the Commissioner did not err in including the entire amount in petitioner's income.

Decision will be entered for the respondent. [44]

United States Board of Tax Appeals
Washington

Docket No. 106640

CLAUDE R. FOOSHE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Findings of Fact and Opinion, promulgated January 27, 1942, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,436.37 for the calendar year 1938.

Enter:

Entered Jan. 28 1942

[Seal] (Signed) R. L. DISNEY

Member. [45]

In the United States Circuit Court of Appeals
For the Ninth Circuit

BTA Docket No. 106,640

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW AND
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes Now Claude R. Fooshe, by his attorney, John L. Wheeler, and respectfully shows:

I.

The petitioner on review is a citizen of the United States and is and has been since the 1st day of May, 1938, a resident of Pasadena, California. Petitioner files his individual income tax return (Form 1040) for the calendar year 1938 with the United States Collector of Internal Revenue at Los Angeles, California, whose office is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner of Internal Revenue returned deficiencies in income taxes against petitioner for the year 1938 [46] in the amount of \$1,436.37, and on February 8th, 1941, in accordance with the provisions of the Internal Revenue laws, sent to petitioner herein a notice of such deficiency. On March 11th, 1941, petitioner filed with the United States Board of Tax Appeals his petition wherein he appealed from said notice of deficiency to said Board. The appeal bears docket No. 106,640.

The Board promulgated its opinion in the case on January 27th, 1942, the citation to which is 46 BTA #27, and entered its decision and final order thereon on January 28th, 1942, holding and deciding that

there was a deficiency in income tax of \$1,436.37 for the calendar year 1938. The question in the case is: Was the major portion of the sum of \$21,504.80 received from the Prudential Insurance Company of America while petitioner and his wife were residents of California, income to the marital community composed of petitioner and his wife, Lura D. Fooshe, or income to petitioner individually?

Petitioner, for many years, was manager of the St. Louis, Missouri, Agency of the Prudential Insurance Company of America, hereafter referred to as the "Company". Under his contract with the Company, petitioner received for a specified period 21½% of the premiums collected from the policies written in the Agency as part of his compensation for services as manager of the St. Louis Agency. In the event of the termination of the contract or collection of the [47] premiums in an agency of the Company not under supervision of petitioner, the Company imposed a 2% collection fee on the premiums from policies written in the agency. Thus, upon termination of the contract or collection of the premiums as aforesaid, the petitioner had the right to continue to receive for the specified period only 1½% of the premium from policies written in the agency.

In 1938, petitioner relinquished the St. Louis Agency, and the contract under which he operated such Agency was terminated. He accepted the management of an ordinary Agency in Los Angeles, California, in which there was a considerably smaller volume of premiums collected and policies written

than was the case in the St. Louis Agency. He undertook the management of the Los Angeles Agency under a new contract with the Company, which provided a different basis of compensation than that provided in the St. Louis Agency contract.

The compensation afforded by the Los Angeles Agency contract on the basis of the volume of business then being done in that Agency was not equal to that received by petitioner in the St. Louis Agency. The Company, to induce petitioner to accept the Los Angeles Agency, agreed to supplement the income to be received under the Los Angeles Agency contract by waiving the 2% collection fee imposed by the Company, as set forth above, on the termination of the St. Louis Agency contract. [48]

On May 1st, 1938, petitioner took charge of the Los Angeles Agency under this new agreement. The additional income represented by the waiver of the 2% collection fee which was received by petitioner while he was acting as manager of the Los Angeles Agency and was a resident of California, constitutes the income in controversy in this proceeding. Petitioner treated it as income belonging to the marital community under the laws of California. Respondent held that it was the separate income of petitioner.

III.

The petitioner herein, Claude R. Fooshe, respectfully shows that he was aggrieved by the action of said United States Board of Tax Appeals and injured thereby, and that the errors complained of are as follows:

1. The Board of Tax Appeals erred in finding,

holding, and deciding that the major portion of the sum of \$21,504.80 was the separate income of petitioner under the laws of California.

2. The Board of Tax Appeals erred in not finding, holding, and deciding that said income was the income of the community composed of petitioner and his wife, Lura D. Fooshe, under the laws of California.

3. The Board of Tax Appeals erred in construing the evidence as determining that said income was the separate income of the petitioner. [49]

4. The Board of Tax Appeals erred in that the conclusion of law arrived at, namely, that the income was the separate income of petitioner, is not supported by and is contrary to the findings of fact.

Wherefore, petitioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Respectfully submitted,

JOHN L. WHEELER

Attorney for Petitioner

1240 Pacific Mutual Building
Los Angeles, California [50]

(Duly Verified.)

[Endorsed]: U.S.B.T.A. Filed Apr. 23, 1942. [51]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To

General Counsel
Bureau of Internal Revenue
Treasury Department
Washington, D. C.

You are hereby notified that Claude R. Fooshe did, on the 23rd day of April, 1942, file with the Clerk of the United States Board of Tax Appeals in Washington, D. C. a Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above entitled case. A copy of the Petition for Review and Assignments of Error as filed is hereto attached and served upon you.

Dated this 21st day of April, 1942.

JOHN L. WHEELER

Attorney for Petitioner [52]

Personal service of the above and foregoing Notice, together with a copy of the Petition for Review and Assignments of Error mentioned therein is hereby acknowledged this 23rd day of April, 1942.

(s) J. P. WENCHEL,

Attorney for Respondent
on Review

[Endorsed]: U.S.B.T.A. Filed April 23, 1942. [53]

[Title of Circuit Court of Appeals and Cause.]

PRAECIPE

To B. D. Gamble, Clerk, United States Board of
Tax Appeals:

Will you kindly prepare, in accordance with the laws and rules of said Court, a transcript of the record in the above entitled matter, such record to include:

1. Stipulation of Fact entered into between Claude R. Fooshe and the Bureau of Internal Revenue;
2. Exhibits A through H, submitted in connection with said Stipulation of Fact, and being all of the exhibits submitted in said proceeding;
3. Supplemental Stipulation of Fact; and
4. All other documents or matters of record in said proceeding submitted to the Board of Tax Appeals in said proceeding.

Dated: May 4th, 1942.

JOHN L. WHEELER

Attorney for Petitioner [54]

[Endorsed]: U.S.B.T.A. Filed May 6, 1942. [55]

[Title of Board and Cause.]

CERTIFICATE TO TRANSCRIPT OF
RECORD

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of July, 1942.

[Seal]

B. D. GAMBLE,

Clerk, United States Board
of Tax Appeals.

[Endorsed]: No. 10204. United States Circuit Court of Appeals for the Ninth Circuit. Claude R. Fooshe, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed July 24, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit
Case No. 10204

CLAUDE R. FOOSHE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Claude R. Fooshe, petitioner, by his attorney, John L. Wheeler, and respectfully shows:

I.

That petitioner on review adopts as his statement of points on which petitioner intends to rely on appeal the assignments of error set forth in Section III of petitioner's petition for review and assignments of error.

II.

Petitioner designates for printing the entire transcript of the proceeding before the United States Board of Tax Appeals.

Dated: August 3rd, 1942.

Respectfully submitted,

JOHN L. WHEELER

Attorney for Petitioner

[Endorsed]: Filed Aug. 5, 1942. Paul P. O'Brien,
Clerk.